

ORIGINAL

BEFORE THE  
Federal Communications Commission

WASHINGTON, D.C.

In the Matter of )

)  
Establishment of a Class A )  
Television Service )  
)

MM Docket No. 00-10

MM Docket No. 99-292

RM-9260

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To the Commission:

**COMMENTS OF**  
**KB PRIME MEDIA LLC**

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Dated: February 10, 2000

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## **SUMMARY**

The Commission should carefully consider the impact of Class A status for eligible low power stations on pending NTSC applications for new full power television stations, as well as allotment proposals, and channel or technical changes for such facilities. Currently, KB Prime Media LLC (“KB”) is the licensee of two full power television stations and the winning bidder for a construction permit for a new television station on Channel 24 at Tallahassee, Florida, as well as the applicant for several new full power NTSC television stations. KB contends that the Commission should interpret the phrase “transmitting in analog format” from the CBPA, describing those full power stations to which Class A LPTV must afford protection, as including first and foremost, those applicants who were successful bidders in the recent broadcast auction. Secondly, KB believes that applications for new full power NTSC stations, pending at the time of the enactment of the CBPA, and related allotment proposals or modifications should also be free from having to protect newly created Class A stations. Finally, KB suggests that the Commission treat LPTV channels as fungible and allow full power NTSC applicants to move LPTV stations to a different channel in order to permit the interference-free operation of new full power NTSC stations.

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To the Commission:

**COMMENTS OF  
KB PRIME MEDIA LLC**

KB Prime Media LLC (“KB”), by its attorneys, hereby respectfully submits the following comments in response to the Commission’s Order and Notice of Proposed Rule Making In the Matter of Establishment of a Class A Television Service, released January 13, 2000 (“NPRM”). Pursuant to Congress’s enactment of the Community Broadcasters Protection Act of 1999 (“CBPA”),<sup>1</sup> the Commission by this Order and Notice of Proposed Rule Making seeks to establish regulations for Class A television licenses for qualifying low-power television (“LPTV”) stations.<sup>2</sup>

**INTRODUCTION**

In addition to being the licensee of full power television stations WSWB(TV), Scranton, Pennsylvania and WFXU(TV), Live Oak, Florida, KB is also the applicant for several new

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<sup>1</sup>Community Broadcasters Protection Act of 1999, Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), Appendix I, *codified* at 47 U.S.C. § 336(f).

<sup>2</sup>The NPRM established February 10, 2000 as the comment date in this proceeding, therefore, these comments are timely filed.

NTSC television stations for which applications are currently pending.<sup>3</sup> In addition, KB is the successful bidder for Channel 24 at Tallahassee, Florida in the recently conducted broadcast auction.<sup>4</sup> As such, KB believes that the Commission should carefully consider the impact of Class A status for eligible low power television stations on pending NTSC applications for new full power television stations, as well as allotment proposals, and channel or technical changes for such facilities. Specifically, KB contends that the Commission should interpret the phrase “transmitting in analog format” from the CBPA, describing those full power stations to which Class A LPTV must afford protection, as including first and foremost, those applicants who were successful bidders in the recent broadcast auction and, but for the fact that the Commission has not completed the ministerial actions involved in the processing of their applications, would now be permittees and without doubt exempt from having to afford any protection to low power television stations. Secondly, KB believes that applications for new full power NTSC stations, pending at the time of the enactment of the CBPA, and related allotment proposals or modifications should also be free from having to protect newly created Class A stations. Finally, KB suggests that the Commission treat LPTV channels as fungible and allow full power NTSC

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<sup>3</sup>Specifically, KB has an application and/or a settlement agreement pending for the following full power television stations: Channel 35, Vicksburg, Mississippi; Channel 55, Gulf Shores, Alabama; Channel 41, Alexandria, Louisiana; Channel 61, Gainesville, Florida; Channel 35, Tupelo, Mississippi; Channel 62, Hammond, Louisiana; Channel 56, Wiggins, Mississippi; and Channel 43, El Dorado, Arkansas.

<sup>4</sup>The auction notices list the applicant as Channel 24 Corp. Channel 24 Corp. is under common control with KB. An amendment to the Tallahassee application, specifying KB as the applicant, is on file with the Commission.

applicants to move LPTV stations to a different channel in order to permit the interference-free operation of new full power NTSC stations.

**I. The Commission Should Define “Transmitting in Analog Format” to Include Pending Applications for New NTSC Stations**

The CBPA provides that a Class A license may not be granted to an LPTV station where the station would cause interference to certain NTSC, DTV, LPTV, and TV translator stations. Specifically, with regard to NTSC facilities, Section (f)(7)(A) of the Act provides that a Class A license or modification of license may not be granted where the station will cause interference “within the predicted Grade B contour (as of the date of enactment of the ... [CBPA] ... or as proposed in a change application filed on or before such date) of any television station transmitting in analog format.”<sup>5</sup> The Commission interprets the phrase “transmitting in analog format” to mean only those stations actually transmitting in analog format and those which have been granted construction permits to construct facilities capable of transmitting in analog format.<sup>6</sup> This narrow definition, however, should be broadened to include pending applications for new NTSC full power stations, including that narrow class of applicants who were the successful bidders at the recently conducted auction, as well as allotment proposals, and modified allotment proposals for channel or other technical changes for such facilities.

**A. Auction Applications**

The Commission’s tentative conclusion that those applicants who were successful at the recent broadcast auction, but who have not yet been granted construction permits, are required to

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<sup>5</sup>47 U.S.C. § 336(f)(7)(A)(I).

<sup>6</sup>NPRM at ¶ 27.

protect existing LPTV stations which qualify for Class A status does not logically flow from the Commission's own conclusions interpreting the statutory language. The NPRM has presumably construed the statutory language "transmitting in analog format" to imply that Congress meant that the language would cover only those stations actually "transmitting," i.e. operational, at the present time. Yet the NPRM itself recognizes that such a result would be too harsh were the phrase to be read as literally requiring that the station be operational in order to be protected from a Class A station, as the NPRM also proposes to give protection against Class A stations to granted construction permits for new stations, whether or not such stations are actually constructed and operating. Thus, the NPRM implicitly concludes that the phrase "transmitting in analog format" does not necessarily mean that the station is actually transmitting, only that, when operational, such station would transmit in such format.

Applicants for new NTSC stations are "transmitting in analog format" to the same extent as are holders of unbuilt construction permits. It appears clear that the phrase "a television station transmitting in analog format" means nothing more than would the words "an analog station." The language is simply an attempt to distinguish the facilities and applications covered by this section from those covered by the succeeding section dealing with digital television stations.

To conclude otherwise would lead to some absurd and unwarranted results. For applicants such as KB, who have in good faith participated in the Commission's auction process, bidding for a station with every intent and expectation that such station could be constructed in the manner for which the application had been submitted, a decision that a newly minted Class A LPTV could prevent that station from being built, or could severely restrict its service area,

amounts to a violation of the due process that should be accorded to applicants participating in the auction. The failure to honor the construction permit as contemplated prior to the auction amounts to a “taking” of the rights implicitly granted to the successful applicant in an auction. As the Commission has stated, “[a]lthough a broadcast permit or license does not confer a property right on its holder, procedural due process rights inherent in the APA attach when the Commission changes the terms or conditions of a permit or license.”<sup>7</sup> If the Commission does not protect NTSC construction permits granted in the broadcast auction, it will essentially be penalizing those applicants for violating a rule without first providing adequate notice that such a rule even existed.<sup>8</sup> The NTSC applicants relied on the Commission’s existing rules and policies when bidding for a new construction permit, and the Commission cannot now change the terms and conditions of that permit.

Based on its commitment of time, funds and the twenty percent down-payment tendered to the Commission, KB and other similarly situated applicants have a legitimate expectation that their applications will be processed in accordance with the rules on which they based their bids. The Commission cannot and should not upset these legitimate expectations.<sup>9</sup> Thus, certainly for

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<sup>7</sup> Biennial Regulatory Review--Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, 1999 FCC LEXIS 4908, FCC 99-267, October 6, 1999, at footnote 38.

<sup>8</sup>“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.” Satellite Broadcasting Co., Inc., v. FCC, 824 F.2d 1,3 (D.C. Cir. 1987) (citations omitted).

<sup>9</sup>In the IVDS auctions, the Commission is only now resolving disputes over auctions conducted more than five years ago in which bids were premised on faulty expectations as to the business prospects of a new service, expectations that were not caused by Commission action but



those applicants who have successfully bid for a frequency at auction, the Commission must conclude that the predicted Grade B contour of these analog stations which will soon be authorized by the FCC, and which were pending at the time of the enactment of the CBPA, are protected from interference from Class A stations.

### **B. Other Applications**

The Commission's tentative conclusion not to include other pending applications for new NTSC full power stations among those stations to be protected from Class A LPTVs penalizes full power applicants who have worked to reach settlement agreements, to create engineering solutions, and to accommodate the Commission's mandatory transition to digital television. To now reward these applicants by refusing to protect them from the newly created Class A LPTV service is unfair and contrary to Congressional intent. As detailed by Section (f)(7) of the CBPA, Congress's primary concern was to protect both analog and digital full power television stations from any interference caused by Class A LPTV stations. There is no reason to believe that this intention should not extend to applicants with pending applications for new NTSC stations who relied on the fact that LPTV stations would be secondary to their proposed full power stations. As the Commission points out, these long pending applications are protected from any new full service analog applications, and they should also be afforded protection from Class A service.

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merely by a change in the technological and business prospects of the service. Those problems spawned years of litigation and untold headaches at the FCC and in the industry. This case would be even worse, as the Commission itself would be creating a situation where the legitimate expectations of an auction bidder are wrecked by a governmental action, after the bids have been placed. The Commission should not allow such a situation to arise.

Further, many of these pending applicants have been displaced by DTV allocations and have been waiting for the Commission to open a filing window so that they can file applications proposing to substitute channels, or specify site changes or power reductions. Only recently have pending applicants had an opportunity to file such channel substitutions, as the Commission announced the opening of a filing window for such applications on November 22, 1999.<sup>10</sup> Therefore, pending applicants for full power analog channels should not be harmed by the Commission's timing in opening a filing window for modifications to these pending NTSC applications. Pending NTSC applicants should not be precluded from receiving the benefit of the time and money they have invested attempting to provide the public with a full power television station merely because of the bureaucratic delay in the processing of their applications. In many cases, applicants have entered into legally binding settlement agreements requiring the payment of substantial sums of money (some of which has been sitting in escrow accounts for over two years) for channels that could be precluded if the protections afforded Class A stations in the CBPA are granted too broadly. In some cases, such settlements have been on file for over two years, without Commission action.<sup>11</sup> Again, the Commission will be upsetting legitimate expectations created over a long period of time were it to interpret the language of the Act to the

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<sup>10</sup>MMB Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations, Public Notice, DA 99-2605, released November 22, 1999. The filing window opened upon release of the Public Notice and closes on March 17, 2000.

<sup>11</sup>For instance, KB reached a settlement with a competing applicant in connection with its Gulf Shores application, in January 1998. In May, 1999, an application was filed demonstrating that the Gulf Shores channel did not create any interference to any proposed digital channel. This application remains pending at the FCC.

exclusion of pending NTSC applications. As with the successful auction applicant, the Commission must conclude that the Grade B contours of the stations for which applications were pending at the time of the CBPA must be protected

**II. The Commission Should Allow Class A LPTV Stations to Accommodate Pending Full Power Applications**

For future changes to television facilities, the Commission should acknowledge in its report and order that television channels are fungible, and thus the channels of Class A LPTV stations can be ordered changed by the Commission upon a request by another applicant who can demonstrate that the channel change would be in the public interest by increasing service, provided that the party requesting such change pay the reasonable costs attendant to such a move. If a Class A LPTV broadcaster can be moved to another channel to avoid interference to the facilities proposed in an NTSC application, and such application would increase service to the public by adding a full power station to the airwaves, then the Commission should not preclude it. An LPTV station's status as a Class A station is reflective of the station's programming and thus the Class A designation should travel with the station, regardless of the channel on which it broadcasts.

The Commission has acknowledged the fungibility of channels in other settings, most significantly in FM radio. With regard to FM radio, it is well established Commission policy that existing licensees may be ordered to change channels or frequencies to accommodate a change that is in the public interest.<sup>12</sup> The Commission has allowed such changes provided that, "[w]henever an existing licensee or permittee is ordered to change frequency to accommodate a

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<sup>12</sup>Circleville, Ohio, 8 FCC 2d 159 (1967).

new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for costs incurred.”<sup>13</sup> Pending NTSC full power applications and Class A LPTV form an analogous situation to FM, as it would be in the public interest to permit the implementation of a new full power television station by requiring an LPTV station to switch channels. In such situations, the LPTV station should be ordered to move channels and the NTSC applicant should be allowed to pay the expenses involved in such a channel shift.

In addition, the transition to DTV, as well as the reallocation of channels 60-69, has already created a state of flux in the television table of allotments. DTV has eliminated any predictability in the arena of television channel allotments, and allowing Class A LPTVs to be moved to another channel to accommodate a pending full power NTSC application would not add significantly to the already fluid nature of television channel allotments. Numerous full and low power television stations, both digital and analog, will continue to seek Commission consent to move channels, either to prevent interference, to replicate NTSC coverage, or to move into the core channels. Indeed, the Commission acknowledged in the NPRM that Class A stations may have to seek displacement relief, and “seek operations on a different channel in order to avoid or eliminate an interference conflict.”<sup>14</sup> Pending applicants for new or improved NTSC stations should be permitted to relocate Class A LPTVs in order to avoid or eliminate any interference

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<sup>13</sup>Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (George West and Pearsall, Texas) 1999 FCC Lexis 6138 (December 3, 1999) (*citing* Circleville, Ohio, 8 FCC 2d 159 (1967)).

<sup>14</sup>NPRM at ¶ 49.

conflict which may exist between the LPTV and an NTSC full power application or modification, upon an agreement to pay the reasonable costs involved.

The Commission states in the NPRM that it believes that, “the statute prohibits us from authorizing any other analog or digital station proposals that would be predicted to interfere with the protected contours of LPTV stations subsequent to the date the station has filed its certification for Class A eligibility, as long as the certification is ultimately granted.”<sup>15</sup> In order to avoid granting an analog station proposal that may interfere with the protected contours of an LPTV station that has filed and/or received Class A certification, the Commission should allow the applicant for the analog station to move the LPTV station to a different, interference-free channel. In this manner, the applicants would rectify any predicted interference and allow the Commission to grant pending full power NTSC proposals, while at the same time protecting the contours of Class A LPTVs as instructed by the statute.

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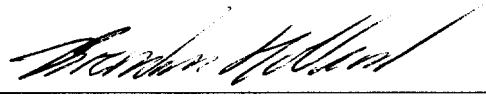
<sup>15</sup>NPRM at ¶ 13.

**CONCLUSION**

For the reasons detailed above, the Commission should interpret Section (f)(7)(A) of the CBPA as affording successful applicants in the recent broadcast auction, as well as pending applications for full power NTSC television stations, protection from the new Class A LPTV service. Furthermore, the Commission should acknowledge the fungibility of channels and allow LPTV stations to accommodate pending full power applicants by moving channels to prevent interference to new NTSC full power stations.

Respectfully submitted,

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Dated: February 10, 2000

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